

1985

Shirley Berube v. Fashion Centre, Ltd., dba Fashion
Gal of Ogden, Joseph E. Torman dba Western
States Polygraph, Steven Taylor and John and Jane
Does 1-10 : Brief of Respondent

Utah Supreme Court

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UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEY BERUBE, :
 :
Plaintiff and :
Appellant, :
 :
vs. : Case No. 20673
 :
FASHION CENTRE, LTD., dba :
FASHION GAL OF OGDEN, JOSEPH E. :
TORMAN dba WESTERN STATES :
POLYGRAPH, STEVEN TAYLOR and :
JOHN and JANE DOES 1-10, :
 :
Defendants and :
Respondents. :

BRIEF OF RESPONDENT JOSEPH E. TORMAN
dba WESTERN STATES POLYGRAPH

APPEAL FROM THE VERDICT, JUDGMENT AND ORDER
SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

THE HONORABLE RONALD O. HYDE AND THE HONORABLE DAVID E. ROTH
DISTRICT JUDGES

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FILED

NOV 4 1985

Clerk Supreme Court Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEY BERUBE,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	Case No. 20,673
FASHION CENTRE, LTD., dba	:	
FASHION GAL OF OGDEN, JOSEPH E.	:	
TORMAN dba WESTERN STATES	:	
POLYGRAPH, STEVEN TAYLOR and	:	
JOHN and JANE DOES 1-10,	:	
	:	
Defendants and	:	
Respondents.	:	

BRIEF OF RESPONDENT TORMAN, dba WESTERN STATES POLYGRAPH

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was the first polygraph examination the cause for the termination of Plaintiff's employment with Defendant Fashion Gal?

The balance of the issues raised on appeal do not apply to this Defendant.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Plaintiff seeks damages against Defendants Torman, dba Western Polygraph Service for alleged negligence in administration, taking and reporting of a polygraph test administered to the Plaintiff at the request of Defendant Fashion Gal, the employer. Defendant Fashion Gal, employer, ultimately terminated Plaintiff from employment for the reason that Plaintiff failed to take a third polygraph examination.

B. DISPOSITION IN LOWER COURT.

The Honorable Ronald O. Hyde granted Defendant Torman's Motion for Summary Judgment before the trial commenced.

A Jury trial was held on the remaining issues against the Defendant Fashion Gal. The jury returned a verdict of no cause of action against the Plaintiff and in favor of Defendant Fashion Gal.

Defendant Steven Taylor, the examiner on the first polygraph examination, was not served and was not a party.

C. STATEMENTS OF FACTS.

Plaintiff was employed by Defendant Fashion Gal in its

Ogden, Utah store. (R. 96 L. 18). There was no written employment agreement. (R. 871 L. 10; R. 872 L. 13). Fashion Gal concluded an inventory shortage had occurred in the previous year and requested its Ogden store employees to take a polygraph test. (R. 897 L. 11-14).

Defendant Fashion Gal contacted Western States Polygraph and requested the polygraph examination. Mr. Joseph Torman was absent. Mr. Steven Taylor, an independent contractor, conducted the polygraph examination of the Plaintiff in the absence of Defendant Torman; and did so as an independent contractor. (Deposition Julia Bateman Pg. 38 L. 15-23; Torman deposition Pg. 44 L. 1825).

Defendant Fashion Gal requested a general, non-specific type of polygraph examination and supplied the questions desired to be asked. (Torman deposition Pg. 22 L. 9-20). Defendant Torman was not present at any time during the polygraph examination or the preparation of the report of the results and was not even aware of the examination of the Plaintiff or its results until the law suit was commenced. (Torman deposition Pg. 42 L. 19-20; Pg. 54 L. 1-8). Procedures followed by examiner Steve Taylor were correct and the test was properly administered. (Bateman deposition Pg. 40 L. 7-24).

Plaintiff signed a written consent to polygraph

examination which waived and released any and all claims and causes of action against Fashion Gal, Western States Polygraph and its examiner prior to the taking of the test. (See Exhibit "A", addendum).

The results of the polygraph examination administered by Steven Taylor were recorded upon the relevant questions supplied by Defendant Fashion Gal to the examiner. The answers reflect that Plaintiff passed the polygraph examination. (See Exhibit "B" addendum). Polygraph examination results showed that Plaintiff showed no dishonesty toward employer, Fashion Gal. (Torman deposition Pg. 57 L. 25; Pg. 58 L. 1-5).

Defendant Fashion Gal wrongfully misrepresented the results that Plaintiff had failed the examination. (R. 905 L. 23-24 to Pg. 907). This wrongful interpretation was not communicated to Defendant Torman. (Torman deposition Pg. 54 L. 1-8).

Defendant Fashion Gal then requested Plaintiff to take a second polygraph examination from the examiner other than Defendants herein; Plaintiff passed the second polygraph examination. (R. 907 L. 8-9).

The results of the first polygraph examination was communicated in writing to Defendant Fashion Gal (See Exhibit "C" addendum).

Defendant Fashion Gal then required Plaintiff to take a third polygraph examination; Plaintiff failed to appear at the time scheduled for the examination. Defendant Fashion Gal terminated Plaintiff for the reason that she failed to take the third polygraph examination. (R. 656; see Exhibit "E" addendum).

SUMMARY OR ARGUMENT

The reason for the termination of Plaintiff as an employee was her failure to take a third polygraph examination. This has nothing to do with the interpretation of the first polygraph examination or the manner in which the first examination was administered.

Plaintiff passed the first polygraph examination. It was properly given and as requested by Defendant Fashion Gal; both as to type of exam given and the questions asked.

Plaintiff signed a written consent to take the examination and release Defendants from liability relating to the test.

The granting of Defendant's Motion for Summary Judgment should be sustained.

ARGUMENT

THE LOWER COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT
IN FAVOR OF DEFENDANT TORMAN AND WESTERN STATES POLYGRAPH

The undisputed fact is that Plaintiff was terminated from the employment of Defendant Fashion Gal for the express reason that she refused to take a third polygraph examination. Plaintiff was not terminated as a result of the first polygraph examination administered by Mr. Steven Taylor; nor the manner in which the test was conducted.

Defendant Fashion Gal furnished and directed the questions to be asked; directed the type of general non-specific examination to be made to the first polygraph examiner. The first polygraph examine was for the purpose of solving and inventory shortage and was general in nature, not specific. The report to Defendant of the results of the first polygraph examination clearly stated that Plaintiff was not involved in the inventory shortage, the purpose for which the first polygraph examination was made; but did show some deception when asked about other employees that might have been involved. Even this was clearly explained in a post-examination discussion between the first polygraph examiner and the Plaintiff and was properly and adequately explained.

All of the subsequent events, after the first

examination, was completely under the control of the Defendant Fashion Gal and the Plaintiff. Defendant Torman had no knowledge, control or information concerning any of the events until this law suit was commenced. He was not even present at the time that the examination took place. No complaints were made to Defendant Torman at any time prior to the taking of the examination. Defendant Torman cannot and should not be held responsible for all of the subsequent events complained of by the other parties herein.

The only issue involving Defendant Torman on appeal is whether or not there was negligence in the administration, interpretation or reporting of the first polygraph test. These issues do not relate to the reason for the termination of the Plaintiff by Defendant Fashion Gal.

On Page 35 of the Appellant's Brief, the Plaintiff agrees with Defendant herein when it states as follows:

"Furthermore, the facts of this case disclose on the face of the Complaint that notwithstanding Plaintiff's passing said examinations, that the Defendant nonetheless terminated her for refusing to submit to a third polygraph examination."

On the facts complained of together with the records before the Court, Judge Hyde correctly ruled as a matter of law, and based upon those facts of record, that Plaintiff could not and should not prevail against Defendant Torman. The jury

could not as a matter of law, from the facts and allegations before the Court hold Defendant Torman responsible for the acts of the other parties herein over which Defendant Torman had no control and did not participate in.

It is not foreseeable to Defendant Torman that the ultimate events that took place would happen. On Page 39 of Appellant's Brief, Plaintiff states in part as follows:

"But for" Defendant Fashion Centres negligence in designing the questions and the negligence of Western in administering and interpreting the results, it is undisputed that the second and third polygraph tests would not have been required."

If the "but for" analysis is applied, it must extended as follows: (a) "But for" the shortage of inventory nothing would have happened to Plaintiff; (b) "But for" Defendant Fashion Gal's policy requiring a polygraph examination, Plaintiff would not have been damaged; (c) "But for" Plaintiff answering a question evidencing deception, which was fully explained and cleared up, nothing further would have happened.

It is clear that the above "but for" analysis cannot and does not apply.

Defendant agrees with case cited by Plaintiff of Mitchell vs. Pearson Enterprises, Utah 1985, 697 P2d 240 which defines proximate cause as follows:

" that causes which, in natural and continuances sequence, (unbroken by an efficient intervening cuase) produces injury and without which the result would not have occurred."

In this case the original polygraph examination events are broken by the series of events of independent origin. The requirement of and failure to take a 3rd polygraph test is an independent cause.

Plaintiff claimed the breach of the oral employment contract was the requirement of the employer Fashion Gal that Plaintiff take a third polygraph examination; that this was unreasonable. The granting of Defendant Torman's Motion for Summary Judgment was based upon Plaintiff's claimed facts and was proper. The events subsequent to the first polygraph test were not foreseeable. See Rees vs. Albertson's, Inc., Utah 1978, 587 P2a 130.


CONCLUSION

The granting Defendant Torman's Motion for Summary Judgment by the Trial Court should be sustained. It was based upon Plaintiff's claimed facts.

The undisputed reason for the termination of Plaintiff's employment was her failure to take a third polygraph examination as required by her employer Fashion Gal.

This is the proximate cause of the termination of employment and is an independent cause that is not related to the first polygraph examination.

DATED this 4th day of November, 1985.



Thomas S. Taylor
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Defendant/Respondent
Torman
55 East Center Street
P.O. Box 1466
Provo, Utah 84603

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent Torman to George W. Preston, Esq., Joseph M. Chambers, Esq., Harris, Preston, Gutke & Chambers, 31 Federal Avenue, Logan, Utah, 84321, attorneys for Appellant and Mr. Theodore E. Kanell, Esq. Hanson, Dunn, Epperson & Smith, 650 Clark - Leaming office Center, 175 South West Temple, Salt Lake City, Utah 84101, Attorneys for Respondent, Fashion Centre, Ltd., on this 4th day of November, 1985.



THOMAS S. TAYLOR

ADDENDUM

1. Exhibit "A", Written Consent and Waiver for Polygraph Test.
2. Exhibit "B", Questions and Answers of First Polygraph Test.
3. Exhibit "C", Report of First Polygraph Exam.
4. Exhibit "D", Ruling of Judge Ronald O. Hyde Granting Defendant Torman's Motion for Summary Judgment.
5. Exhibit "E", Termination Slip of Plaintiff.

EXHIBIT "A"

I, Shirley Birrell age 28

of my own free will and without duress, agree to submit to a polygraph test.

I hereby waive and release any and all claims and causes of action of every

kind whatsoever against

and Western States Polygraph and its examiner.

Having read and understood the above, I signify my agreement by my signature.

Date

3/8/82

Signature

Shirley Birrell

Witness

SO

If I have any reason to believe that the examination, or the examiner, was not completely impartial, fair and professional, I am encouraged to report this matter to the Utah State Department of Public Safety at 533-6043, which regulates polygraph examiners throughout the state.

Date

3/8/82

Signature

Shirley Birrell

Witness

SO

EXHIBIT "B"

1. Do you know for certain who has cheated or stolen anything from that FASHION GAL store? *Ronald Terry Jackson*
2. Did you ever steal or cheat that FASHION GAL store out of any cash?
3. Did you steal any cash at that FASHION GAL?
4. Have you used any scheme to steal or cheat that FASHION GAL store?
5. Did you ever steal any merchandise from that FASHION GAL store?
6. Did you ever remove any merchandise from that FASHION GAL store without paying for it?
7. Did you ever help anyone, in any way, to steal merchandise or money from that FASHION GAL store?
8. Did you ever deliberately allow merchandise to be removed from that FASHION GAL store without it being paid for?
9. Have you ever intentionally failed to register a VISA or Master Card sale?
10. Have you ever given or written a false merchandise credit or refund?
11. Have you ever intentionally recorded a false payment on a layaway?

MANAGEMENT QUESTIONS ONLY

12. Have you ever falsified the Daily Report in any way?
13. Have you ever falsified Mark Downs?
14. Have you ever falsified any company documents for personal gain or benefit?
15. Have you knowingly violated any company policy with the intention of cheating the company out of money or merchandise?

POST Test — She stated
at all though she doesn't know for
ain of others — she has very strong
spicious of others — especially those who
+ in quit rather than take polygraphs
(THREATENED TO QUIT)

EXHIBIT "C"

Suite 115

March 15, 1982

CONFIDENTIAL

Apparel Industries, Inc.
Attention: Heidi Wanderlich

Shirley Berube came to the office of Western States Polygraph March 8, 1982 to determine her loyalty to and honesty with Fashion Gal.

Fashion Gal Relevant Questions:

Subject showed deception on the questions "Do you know for certain who has cheated or stolen anything from Fashion Gal?" She said it was rumored that Terry Jackson had. In a post-test statement the subject stated that although she doesn't know for certain of others she has very strong suspicions of others - especially those who threatened to quit rather than take the polygraph test.

No deception was indicated on the remainder of the Fashion Gal relevant questions, including the management questions.

Western States Polygraph

EXHIBIT "D"

DEC 18 4 19 PM '84
J. C. WEBER
CLERK
RICHMOND, UTAH

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

SHIRLEY BERUBE,

Plaintiff,

vs.

FASHION CENTRE, LTD., et al.,

Defendant.

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RULING ON MOTION FOR
SUMMARY JUDGMENT

Case No. 87113

Basic relevant facts are, as I understand them, that the Plaintiff Shirley Berube was employed by the Defendant Fashion Gal as an assistant store manager at the Ogden store. There was no written employment agreement between the parties, but Fashion Gal did have written rules and regulations regarding personnel practices. Specifically, Fashion Gal had rules relating to the taking of polygraph tests, which provided that "an employee may be terminated without prior warning for the following reasons: (g) refusal to take a polygraph test." Defendant Fashion Gal concluded that they had an inventory shortage and requested their employees to take a polygraph test. The plaintiff took the test along with other employees. The test was conducted by Defendant Western States using questions supplied by the defendant Fashion Gal. The examiner reported to Fashion Gal that the plaintiff satisfactorily completed the test, with the exception that they

Ruling on Motion for
Summary Judgment
Case No. 87113

found possible deception in response to the question "Do you know for certain who has cheated or stolen anything from Fashion Gal store?" As a result of this possible deception, the defendant requested a second polygraph test which plaintiff passed. The second test was conducted by a different examiner. Whereupon defendant requested plaintiff take a third polygraph examination, which she refused. Whereupon she was terminated for refusing to take a third test. Thereafter, plaintiff, in seeking other employment, applied at Brooks in Ogden. When the manager of Brooks called the Defendant Fashion Gal store for a reference, Jolyn Flint, manager of the store, reported that the plaintiff had refused to take a polygraph test and that was the basis for her termination. She did not get the job at Brooks. Plaintiff thereupon filed this complaint setting forth four causes of action, and defendants herein have filed their motions for summary judgment.

First cause of action is entitled "Negligent Misrepresentation". The essence of Count I is that Western owed plaintiff a duty to conduct a fair test and exercise reasonable care and competence in obtaining its conclusions, and that the Defendant Fashion Gal failed to exercise reasonable care in determining the standards employed by Western. This does not set out a cause of action for negligent misrepresentation, or even for negligence, inasmuch as the reasons for termination has nothing to do with the interpretation of the test, but the

failure to take an additional test. Plaintiff was not discharged for failing the test and the method of conducting or interpretation does not relate to the reason for which she was fired. Defendant Fashion Gal is granted summary judgment as to Count I.

Count II entitled "Defamation, Injurious Falsehood, and Interference with Prospective Economic Advantage", basically hinges on the difference between a polygraph test and the third polygraph test. Frankly, it appears to be a play on words to a certain extent. However, I feel that the pleading in this cause of action does establish an issue of material fact which must be viewed in a light most favorable to the plaintiff; motion for summary judgment is denied for Count II.

As to the third count, "Outrageous Conduct Causing Severe Emotional Distress", the record herein does not support the assertion of plaintiff that the conduct of the defendant was so outrageous and extreme that it offended the generally acceptable standards of decency and morality. There is no genuine issue as to any material fact in regard to this count and defendant is granted summary judgment on Count III.

As to the counts for "Wrongful Termination and Breach of Implied Condition of Employment Contract" and "Wrongful Discharge" (tort), the question herein basically appears to be whether or not the policy manual is the "express or implied" exception to the "at will" rules, together with the question of good faith and fair dealing. Viewing the matter in a light most

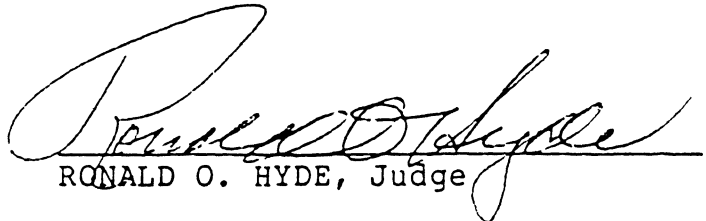
favorable to the plaintiff, it appears there may be a genuine issue of material fact sufficient to warrant trial. Defendants' motion for summary judgment on these counts is denied.

In regard to Western Polygraph's motion for summary judgment, it appears that they conducted an examination at the request of Defendant Fashion Centre, with the consent of the plaintiff. The taking of the test, the method of taking the test, or the interpretation of the test was not the cause of the discharge of plaintiff. The cause of her discharge was the failure to take the third polygraph test. The basis of the action is wrongful discharge and defamation, none of which apply to the Defendant Western.

There does not appear to be a genuine issue as to any material fact, and the Defendant Torman dba Western States Polygraph's motion for summary judgment is granted.

Attorney for Fashion Centre is to prepare an order in accordance herewith.

DATED this 18 day of December, 1984.


RONALD O. HYDE, Judge

UTAH DEPARTMENT OF EMPLOYMENT SECURITY — SEPARATION NOTICE

Worker's Name Shirley Berube Social Security No. 529-88-7834
 Last date hired or rehired 5-6-79 Date last worked 4-28-82

REASON FOR SEPARATION

- | | |
|--|-------------------------------------|
| 1. <input type="checkbox"/> Reduction of Force | 4. <input type="checkbox"/> Strike |
| 2. <input type="checkbox"/> Quit | 5. <input type="checkbox"/> Retired |
| 3. <input checked="" type="checkbox"/> Fired | |

EXPLANATION

Termination
refused to take
3 and polygraph.

WILL THIS INDIVIDUAL BE REPLACED?

☒ YES

☐ NO

☐ UNKNOWN

ENTER ADDRESS TO WHICH REQUESTS FOR WAGE INFORMATION SHOULD BE SENT:

NAME OF COMPANY Fashion Gal UTAH EMPLOYMENT SECURITY
 NAME OF OWNER(S) _____ REGISTRATION NUMBER 21562197915
 MAILING ADDRESS 8500 Valcour
 TELEPHONE 1-714-638-1500 CITY St Louis STATE Mo ZIP CODE 63123

I CERTIFY THIS INFORMATION IS TRUE AND CORRECT. I KNOW THE LAW PROVIDES PENALTIES FOR FALSE STATEMENTS.

Signed by [Signature] Title Regional Supervisor Date 4-24-82
 Form 637-A Rev. 11/81 (SEE REVERSE SIDE)

INFORMATION AND INSTRUCTIONS

This Separation Notice is for use by the worker in filing a claim for unemployment insurance. THIS FORM IS NOT INTENDED TO BE USED FOR ANY OTHER PURPOSE. THE INFORMATION IS CONFIDENTIAL BETWEEN THE EMPLOYER ISSUING THE FORM, THE WORKER, AND THE UTAH DEPARTMENT OF EMPLOYMENT SECURITY.

TO THE WORKER Present this notice at the Employment Security Office when you file a claim for unemployment insurance. If you disagree with the information shown by the employer, you will be allowed to give an explanation at the time you file your claim. Do not make changes to the information entered on the form. You may file a claim as soon as you become unemployed. Retain this notice for 15 months.

TO THE EMPLOYER You are responsible for reporting the correct information as to the reason for unemployment. In each case explain the cause of the unemployment. You must furnish an original copy of the Separation Notice to each worker at the time of separation. Retain a copy in your file for 15 months. (SHOW THE ADDRESS TO WHICH REQUESTS FOR WAGE INFORMATION SHOULD BE SENT.)

PENALTY PROVISION Section 35-4-17(h) of the Utah Employment Security Act provides that a \$10 penalty be assessed against an employer for each failure to furnish a Separation Notice to a worker when he/she is separated